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No. 07-1122

In the Supreme Court of the United States

STATE OF ARIZONA,

PETITIONER,

v.

LEMON MONTREA JOHNSON,

RESPONDENT.

On Writ of Certiorari to the Arizona Court of Appeals

BRIEF FOR THE STATES OF ILLINOIS, ALABAMA, ARKANSAS, COLORADO, DELAWARE, FLORIDA, HAWAII, IDAHO, INDIANA, KANSAS, KENTUCKY, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WISCONSIN, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

In the context of a vehicular stop for a minor traffic infraction, may an officer conduct a pat-down search of a passenger when the officer has an articulable basis to believe the passenger might be armed and presently dangerous, but has no reasonable grounds to believe that the passenger is committing, or has committed, a criminal offense?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

STATEMENT 1

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. During A Lawful Traffic Stop, Police May Frisk Any Of The Car's Occupants On Reasonable Suspicion That They Might Be Armed And Dangerous 7

II. State And Federal Courts Universally Endorse Petitioner's Rule 13

III. Officer Trevizo's Pat-Down of Respondent Was Proper Because It Occurred During A Lawful Traffic Stop And On Reasonable Suspicion That He Might Be Armed And Dangerous 21

CONCLUSION 28

TABLE OF AUTHORITIES

Cases: **Page**

Adams v. Williams, 407 U.S. 143 (1972) 10

Ammons v. State,
322 S.E.2d 543 (Ga. Ct. App. 1984) 17

Arkansas v. Sullivan, 532 U.S. 769 (2001) 24

Brendlin v. California,
127 S. Ct. 2400 (2007) 22, 24

Camp v. State,
983 So.2d 1141 (Ala. Crim. App. 2007) 18

Commonwealth v. Mesa,
683 A.2d 643 (Pa. Super. Ct. 1996) 17

Commonwealth v. Washington,
869 N.E.2d 605 (Ma. 2007) 18

Dewberry v. State,
905 So. 2d 963 (Fla. Dist. Ct. App. 2005) 16

Erickson v. State,
141 P.3d 356 (Alaska App. 2006) 18-19

Everitt v. General Electric Co.,
932 A.2d 831 (N.H. 2007) 20

Fender v. State, 74 P.3d 1220 (Wyo. 2003) 15

Florida v. Bostick, 501 U.S. 429 (1991) 26

Foley v. Connelie, 435 U.S. 291 (1978) 9

Ford v. State, 26 S.W.3d 669 (Tex. App. 2000) . . . 16

Illinois v. Caballes, 543 U.S. 405 (2005) 26

Illinois v. Wardlow, 528 U.S. 119 (2000) 27, 28

Jackson v. State,
669 N.E.2d 744 (Ind. Ct. App. 1996) 17

Joshua v. DeWitt, 341 F.3d 430 (6th Cir. 2003) . . . 14

Knowles v. Iowa, 525 U.S. 113 (1998) 1, 5, 8, 12

Maryland v. Wilson, 519 U.S. 408 (1997) . . 5, 8, 9, 10

Matoumba v. State,
873 A.2d 386 (Md. Ct. Spec. App. 2005) 16

McCain v. Commonwealth,
659 S.E.2d 512 (Va. 2008) 18

Michigan v. Long, 463 U.S. 1032 (1983) . . . 9, 10, 27

Mitchell v. State, 745 N.E.2d 775 (Ind. 2001) 18

Muehler v. Mena, 544 U.S. 93 (2005) 26

Ohio v. Robinette, 519 U.S. 33 (1996) 24

Pennsylvania v. Mimms,
434 U.S. 106 (1977) . . . . . *passim*

People v. Batista,
672 N.E.2d 581 (N.Y. 1996) 16, 27

People v. Gonzalez,
704 N.E.2d 375 (Ill. 1998) 14, 15

People v. Harris, 886 N.E.2d 947 (Ill. 2008) 26

People v. Jackson,
948 P.2d 506 (Colo. 1997) 16, 20, 23

People v. Massey,
546 N.W.2d 711 (Mich. Ct. App. 1996) 17

People v. Sorenson,
752 N.E. 2d 1078 (Ill. 2001) 14, 15

Shaver v. State, 963 S.W.2d 598 (Ark. 1998) 16

State v. Baker,
182 P.3d 935 (Utah Ct. App. 2008) 18

State v. Banda, 639 S.E.2d 36 (S.C. 2006) 15

State v. Eggersgluess,
483 N.W.2d 94 (Minn. Ct. App. 1992) 19

State v. Henage, 152 P.3d 16 (Idaho 2007) 23

State v. Horrace, 28 P.3d 753 (Wash. 2001) 16

State v. Irwin,
137 P.3d 1024 (Idaho Ct. App. 2006) 21

State v. Jackson,
557 P.2d 691 (Or. Ct. App. 1976) 17-18

State v. Kyles, 675 N.W.2d 449 (Wis. 2004) 18

State v. Phommachanh,
662 A.2d 1343 (Ct. App. Ct. 1995) 17

State v. Randleman,
671 N.E.2d 267 (Ohio Ct. App. 1995) 17, 21

State v. Richards,
713 So. 2d 514 (La. Ct. App. 1998) 17

State v. Shearin,
612 S.E.2d 371 (N.C. Ct. App. 2005) 16, 21

State v. Sloane, 939 A.2d 796 (N.J. 2008) 20

State v. Smith, 637 A.2d 158 (N.J. 1994) 16

State v. Vandenberg,
81 P.3d 19 (N.M. 2003) 20, 24

State v. Warren, 78 P.3d 590 (Utah 2003) 20

Terry v. Ohio, 392 U.S. 1 (1968) . . . . . *passim*

United States v. Brignoni-Ponce,
422 U.S. 873 (1975) 8

United States v. Bullock,
510 F.3d 342 (D.C. Cir. 2007) 20

United States v. Colin,
928 F.2d 676 (5th Cir. 1991) 14

United States v. Hernandez,
418 F.3d 1206 (11th Cir. 2005) 26

United States v. Hernandez-Rivas,
348 F.3d 595 (7th Cir. 2003) 13

United States v. Holmes,
385 F.3d 786 (D.C. Cir. 2004) 19

United States v. Holt,
264 F.3d 1215 (10th Cir. 2001) 20

United States v. Menard,
95 F.3d 9 (8th Cir. 1996) 20

United States v. Mendez,
476 F.3d 1077 (9th Cir. 2007) 26

United States v. Mitchell,
951 F.2d 1291 (D.C. Cir. 1991) 13

United States v. Moorefield,
111 F.3d 10 (3d Cir. 1997) 13, 20

United States v. Olivera-Mendez,
484 F.3d 505 (8th Cir. 2007) 26

United States v. Raymond,
152 F.3d 309 (4th Cir. 1998) 13

United States v. Rice,
483 F.3d 1079 (10th Cir. 2007) 13

United States v. Robinson,
414 U.S. 218 (1973) 9-10, 10

United States v. Singh,
415 F.3d 288 (2d Cir. 2005) 26

United States v. Soares,
521 F.3d 117 (1st Cir. 2008) 13

United States v. Soriano-Jarquin,
492 F.3d 495 (4th Cir. 2007) 26

United States v. Stanfield,
109 F.3d 976 (4th Cir. 1997) 20

United States v. Stewart,
473 F.3d 1265 (10th Cir. 2007) 26

United States v. Wanless,
882 F.2d 1459 (9th Cir. 1989) 14

United States v. Woodall,
938 F.2d 834 (8th Cir. 1991) 14

Whren v. United States, 517 U.S. 806 (1996) . . . 8, 25

Miscellaneous:

Federal Bureau of Investigation, *Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted* (2006) (found at http://www.fbi.gov/ucr/killed/2006/index.html) 10-11, 11

Federal Bureau of Investigation, *Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted*, May 12, 2008 Press Release (found at http://www.fbi.gov/pressrel/pressrel08/leoka051208htm) 11

INTEREST OF THE *AMICI CURIAE*

In its unanimous decision in *Knowles v. Iowa*, 525 U.S. 113 (1998), this Court indicated in dicta that after lawfully stopping a vehicle for a traffic offense, a police officer legitimately may frisk any of the car's occupants for weapons if the officer has an articulable basis to believe that the occupant might present a threat to the safety of the officer or others. See *id.* at 117-118. Unlike *Knowles*, this case squarely presents the issue, and petitioner asks the Court reaffirm its pronouncement that occupant frisks are lawful under these circumstances.

The *amici* States have a substantial interest in the resolution of this issue. Many state and lower federal courts have adopted this principle from *Knowles*, recognizing that vehicle stops present a particular danger to law enforcement, a tragic reality confirmed by the number of police officers who are assaulted and murdered each year during stops. The Court's rejection of petitioner's proposed rule would abrogate favorable law on which many States have come to rely and undermine States' ability to protect police officers and the public.

STATEMENT

1. Police Officer Maria Trevizo, accompanied by two partners, Officer Machado and Officer Gittings, lawfully stopped a vehicle in which respondent was a passenger. Pet. App. A2-A3. After the car pulled over, Officer Trevizo saw respondent, who was riding in the back seat, look back at the police, say something to the driver and front-seat passenger, and continue to watch the police. *Id.* at A3. Because people normally look

forward during a traffic stop, this conduct was unusual, and it made Officer Trevizo nervous. *Ibid.* Once the car stopped, Officer Machado asked the occupants to "put their hands where he [could] see them" and the driver to exit the car. *Ibid.* Officer Machado then questioned the driver, Officer Gittings questioned the front-seat passenger, and Officer Trevizo questioned respondent. *Id.* at A3-A5, A21.

A gang specialist, Officer Trevizo observed multiple indicia that respondent might be a gang member. *Id.* at A2-A3, A23-A24. She noted respondent's age; that he was dressed entirely in blue and wearing a blue bandana, attire favored by members of the "Crips" gang; and that the traffic stop occurred on the border of a known Crip neighborhood. *Id.* at A2-A4, A23. When asked for identification, respondent said that he did not have any but revealed that he was from Eloy, another Crip neighborhood, and that he was a convicted felon. *Id.* at A4, A23-A24. Officer Trevizo also noted that respondent was carrying a police scanner in his jacket pocket, indicating that he might be involved in criminal activity or seeking to evade the police. *Id.* at A4, A23.

Hoping to gather intelligence about respondent's gang, Officer Trevizo asked him to get out of the car for additional questioning. *Id.* at A4-A5. Respondent complied, and, after he exited the car, Officer Trevizo "patted him down for officer safety because [she] had a lot of information that would lead [her] to believe he might have a weapon on him." *Id.* at A5. Not only had respondent behaved unusually, but Officer Trevizo also knew from her police training that gang members often carry firearms. *Id.* at A2.

Officer Trevizo conducted a frisk of respondent's exterior clothing and felt the butt of a handgun at his waist. *Id.* at A5. A subsequent search of his person incident to arrest on a weapons charge revealed a small quantity of marijuana. Based on this evidence, respondent was charged with and convicted of possession of a weapon by a prohibited possessor and possession of marijuana. *Ibid.*

2. The Arizona Court of Appeals overturned respondent's conviction, holding that Officer Trevizo's pat-down violated the Fourth Amendment and suppressing the resulting evidence. *Id.* at A5-A17. According to the court, it was unnecessary to reach the question whether police "in the interests of their own safety, and based solely on the seizure resulting from the initial traffic stop, may routinely pat down passengers whom they suspect of no crime but whom they reasonably suspect might be dangerous," because Officer Trevizo did not "immediately" order respondent out of the vehicle to frisk him but instead conducted the pat-down after preliminarily questioning him and then requesting that he step out of the car for additional questions. *Id.* at A16. The court concluded that respondent's interaction with Officer Trevizo had "evolved into a separate, consensual encounter" by the time of the weapons frisk, and, accordingly, the pat-down could not be justified by officer safety concerns but instead required reasonable suspicion of criminal conduct independent of the traffic violation. *Id.* at A15-A17.

In dissent, Judge Espinosa stated that the majority had "essentially conclude[d] that an officer reasonably fearing for her safety during a lawful

roadside vehicle stop may not ensure her own safety and that of others by patting down a suspicious passenger for weapons." *Id.* at A18. This holding, he continued, "is not only contrary to settled law, but could have the unintended effect of unnecessarily increasing the already high level of risk faced by law enforcement officers during some vehicle stops." *Ibid.* Accordingly, Judge Espinosa would have held that the frisk was proper because it occurred within "a few short moments" of the traffic stop, *id.* at A20, the stop was ongoing and respondent could not reasonably have believed he was free to leave, and Officer Trevizo had reason to believe respondent might be armed and dangerous, *id.* at A20-A24.

3. The Arizona Supreme Court denied review, *id.* at B1-B2, and, on June 23, 2008, this Court granted Arizona's petition for certiorari to determine whether, "[i]n the context of a vehicular stop for a minor traffic infraction," an officer may "conduct a pat-down search of a passenger when the officer has an articulable basis to believe the passenger might be armed and presently dangerous, but has no reasonable grounds to believe that the passenger is committing, or has committed, a criminal offense?"

SUMMARY OF ARGUMENT

In *Knowles*, this Court stated in dicta that, during a lawful traffic stop, the police "may order out of a vehicle both the driver, [*Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977) (*per curiam*)], and any passengers, [*Maryland v. Wilson*, 519 U.S. 408, 414 (1997)]," and "perform a 'patdown' of [the] driver and any passengers upon reasonable suspicion that they may be armed and dangerous, *Terry v. Ohio*, 392 U.S. 1 (1968)." *Knowles*, 525 U.S. at 117-118. Steadfast application of *Knowles* and the precedents cited therein requires confirmation of this principle to uphold the patdown in this case.

The rule urged by petitioner complies with the Court's well-settled mandate that a police search is reasonable and thus faithful to the Fourth Amendment if the public interest served by the search outweighs the individual's interest in avoiding the search. The always-weighty public interest in officer safety is heightened in the context of vehicle stops, which present a particular danger to law enforcement personnel. At the same time, the intrusion on the individual's interest is minimized, both because the applicable search is limited to a frisk of the outer clothing for weapons and because it is performed not as a matter of course but on individualized suspicion that the person being searched may be armed and dangerous.

Petitioner's proposed rule also comports with the holdings of myriad state and federal courts, which have consistently interpreted this Court's Fourth Amendment jurisprudence to allow the type of search performed here. These courts acknowledge the perilous nature of traffic stops and carefully hew to the

rule that a minimally intrusive frisk for weapons is permissible if the officer has a reasonable safety concern. Accordingly, a decision rejecting petitioner's proposed rule in this case would abrogate a host of decisions on which the States have come to rely to preserve the safety of law enforcement officers and the public.

Applied to this case, petitioner's rule requires reversal of the decision below. At the time respondent was frisked, the police had not yet concluded their investigation into the traffic offense, and no reasonable person in respondent's place would have felt free to terminate those proceedings. Under these circumstances, neither Officer Trevizo's subjective beliefs nor the nature of her questions could convert the ongoing traffic stop into a "consensual encounter." And because respondent's atypical behavior and likely gang affiliation gave Officer Trevizo firm grounds to suspect that he might be armed and dangerous, the Fourth Amendment did not prohibit her from searching him for weapons to protect her own safety and the safety of her fellow officers and the public.

ARGUMENT

The Arizona Court of Appeals diverged from numerous state and lower federal courts that have faithfully applied this Court's precedents to hold that, after lawfully stopping a car for a traffic infraction, the police may pat down the car's driver and any passengers on reasonable suspicion that they might be armed and dangerous. The Court should reverse the judgment below and thereby reaffirm the authority of law enforcement officers to protect themselves and the public from the dangers that are inherent in even routine traffic stops.

I. DURING A LAWFUL TRAFFIC STOP, POLICE MAY FRISK ANY OF THE CAR'S OCCUPANTS ON REASONABLE SUSPICION THAT THEY MIGHT BE ARMED AND DANGEROUS.

This Court's Fourth Amendment jurisprudence firmly supports the principle that, during a lawful traffic stop, a police officer may frisk one of the vehicle's occupants for weapons if the officer harbors reasonable concerns for his or her safety, without suspicion of criminal activity other than the traffic offence. *Terry* holds that police may detain a person whom they reasonably believe has committed or may commit a crime, and permits them to conduct a limited search for weapons based on a reasonable belief that the person might be armed and dangerous. See 392 U.S. at 22-27, 30-31. In *Mimms*, the Court extended the *Terry* rule to vehicle stops. See 434 U.S. at 109, 111-112 (approving police pat-down of driver pursuant to lawful vehicle stop on reasonable suspicion that he might be armed and dangerous). At the same time, the Court confirmed that the decision to stop an

automobile is reasonable so long as police have probable cause to believe a traffic offense has occurred. See *Mimms*, 434 U.S. at 109; see also *Whren v. United States*, 517 U.S. 806, 810-819 (1996) (rejecting argument that not every traffic offense provides justification for a police stop).

Also in *Mimms*, the Court held that the police may, as a matter of course, order the driver of a lawfully stopped car to exit his vehicle, see *Mimms*, 434 U.S. at 110-111, a principle that the Court subsequently extended to passengers, see *Wilson*, 519 U.S. at 410. Citing these precedents, the Court in *Knowles* stated that, "in the case of a routine traffic stop," the police may "order out of a vehicle both the driver * * * and any passengers" and "perform a 'patdown' of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous." *Id.* at 117-118 (citations omitted). This statement was a correct application of the Court's prior decisions and should be confirmed here.

The Court has long recognized that "'[t]he touchstone of [its] analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.'" *Mimms*, 434 U.S. at 109 (quoting *Terry*, 392 U.S. at 19). Reasonableness in this context "depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.'" *Mimms*, 434 U.S. at 109 (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975)); see also *Wilson*, 519 U.S. at 411. And in all events it is "'unreasonable to require that police officers take unnecessary risks in the performance of their duties.'"

Mimms, 434 U.S. at 110 (quoting *Terry*, 392 U.S. at 23).

Petitioner's rule follows inexorably from these established principles. First, it is "too plain for argument" that the public's interest in officer safety "is both legitimate and weighty." *Mimms*, 434 U.S. at 110; accord *Wilson*, 519 U.S. at 413 (noting the "weighty interest in officer safety"). This "important interest," *Mimms*, 434 U.S. at 111, is of special significance in cases like this one because "traffic stops may be dangerous encounters," *Wilson*, 519 U.S. at 413; accord *Michigan v. Long*, 463 U.S. 1032, 1049 (1983) ("roadside encounters between police and suspects are especially hazardous"); *Foley v. Connelie*, 435 U.S. 291, 298 (1978) (noting "the number of police officers wounded or killed in the process of making inquiry in borderline, seemingly minor violation situations" involving traffic infractions); *Mimms*, 434 U.S. at 110 (acknowledging the "inordinate risk confronting an officer as he approaches a person seated in an automobile"). Additionally, the "danger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car." *Wilson*, 519 U.S. at 414.

Recognizing the inherent danger traffic stops pose for police, the Court has approved a variety of searches undertaken during vehicle stops as necessary to protect officer safety. See, *e.g.*, *Long*, 463 U.S. at 1049 (police may search passenger compartment of stopped vehicle, on reasonable belief that suspect is dangerous and may gain immediate control of weapons); *Mimms*, 434 U.S. at 110-112 (police may order driver out of car during traffic stop and frisk for weapons on reasonable belief that driver is armed and dangerous); *United States v.*

Robinson, 414 U.S. 218, 234-235 & n.5 (1973) (after making arrest for traffic violation, police may perform full search of the person, even absent individualized suspicion that arrestee is armed and dangerous); see also *Adams v. Williams*, 407 U.S. 143, 147-148 & n.3 (1972) (while investigating suspect seated in car, police may undertake weapons frisk on reasonable suspicion that suspect is armed and dangerous).

The officer safety concerns underlying these decisions are equally compelling today. In *Long*, *Mimms*, and *Adams*, the Court relied on a 1963 study demonstrating that "approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile." *Long*, 463 U.S. at 1048 n.13; *Mimms*, 434 U.S. at 110; *Adams*, 407 U.S. at 148 n.3. And in *Robinson*, the Court cited 1973 data showing that a "significant percentage"—approximately one third—"of murders of police officers occur[red] when the officers were making traffic stops." 414 U.S. at 234 n.5. The Court also has relied on 1994 statistics demonstrating that in that year 5,762 officers were assaulted and 11 were killed during traffic pursuits and stops, see *Wilson*, 519 U.S. at 413, and has noted more generally that the "easy availability of firearms * * * is relevant to an assessment of the need for some form of self-protective search power," *Terry*, 392 U.S. at 24 n.21.

In the years since these cases were decided, the statistics on which the Court relied have remained remarkably consistent. The most recent data revealed that in 2006, 6,490 officers were assaulted and 8 were killed during traffic pursuits or stops. See Federal Bureau of Investigation, *Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted*, Tables 19

& 66 (2006) ("Uniform Crime Reports") (found at http://www.fbi.gov/ucr/killed/2006/table19.html & http://www.fbi.gov/ucr/killed/2006/table66.html).[1] More than 40% of those assaults involved a dangerous weapon such as a gun or a knife. See *Uniform Crime Reports*, Table 71 (found at http://www.fbi.gov/ucr/killed/2006/table71.html). Firearms were used to commit 78 of the 100 murders of law enforcement officers during traffic pursuits and stops—and 56 of the 64 murders during traffic offense stops—during the past ten years. See *Uniform Crime Reports*, Table 32 (found at http://www.fbi.gov/ucr/killed/2006/table32.html).

In sum, years of data establish the extreme danger that handguns and other easily concealed weapons pose to officers making traffic stops, and a rule permitting police to conduct brief, minimally intrusive searches for these weapons therefore furthers an obvious and monumental public purpose.

As for the personal liberty side of the ledger, the intrusion is not that occasioned by the initial stop or

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[1] All eight of the murdered officers were killed during traffic violation stops. See *Uniform Crime Reports*, Table 19 (found at http://www.fbi.gov/ucr/killed/2006/table19.html). Six of these murders—or 75%—involved a handgun. See *Uniform Crime Reports*, Table 31 (found at http://www.fbi.gov/ucr/killed/2006/table31.html). Although the FBI has yet to release final statistics for 2007, preliminary data show that 11 officers were killed during traffic pursuits and stops that year. See *Uniform Crime Reports*, May 12, 2008 Press Release (found at http://www.fbi.gov/pressrel/pressrel08/leoka051208htm).

the request to exit the vehicle—both of which are unquestionably lawful. See *supra* pp. 7-8. Rather, at issue is the additional invasion arising from the pat-down. To be sure, a protective search for weapons may inflict unpleasantness or discomfort. See *Terry*, 392 U.S. at 24-25. But such a search is less intrusive than long-permitted police measures. A weapons frisk is far less time-consuming and invasive than, for example, a full search of either the person or the car's passenger compartment—the former "must * * * be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments," *Terry*, 392 U.S. at 29, that is, it cannot exceed "a carefully limited search of the outer clothing * * * in an attempt to discover weapons," *id.* at 30; see also *Knowles*, 525 U.S. at 117 (noting "the considerably greater intrusion attending a full field-type search"). And unlike an order to exit the car after a traffic stop or a search of either the person or the passenger compartment incident to arrest, the pat-down is proper not as a matter of course, but only if the officer "has reason to believe that he is dealing with an armed and dangerous individual." *Terry*, 392 U.S. at 27.

In short, the public interest advanced by petitioner's rule grossly outweighs the relatively minor affront to personal liberty. The frisk for weapons is brief, far less invasive than a full search, and precipitated by individualized suspicion. Yet it serves a critical function in reducing the substantial threat to police and others that even the most routine traffic stops present.

II. STATE AND FEDERAL COURTS UNIVERSALLY ENDORSE PETITIONER'S RULE.

Petitioner's proposed rule not only follows from this Court's Fourth Amendment decisions, but every state and lower federal court to reach the question—other than the court below—has adopted it. As dissenting Judge Espinosa recognized, the majority's conclusion below is quite simply "contrary to settled law." Pet. App. A18.

So long as there was a reasonable basis for the officer to suspect that the passenger might be armed and dangerous, federal courts of appeals have upheld pat-down searches accompanying vehicle stops. See, *e.g.*, *United States v. Soares*, 521 F.3d 117, 120-122 (1st Cir. 2008) (following stop for driving without headlights, pat-down of passenger was proper because officer observed passenger engage in suspicious movements); *United States v. Rice*, 483 F.3d 1079, 1084-1085 (10th Cir. 2007) (following stop for traffic infraction, pat-down of passenger was proper because police had information that passenger was armed and dangerous); *United States v. Hernandez-Rivas*, 348 F.3d 595, 599 (7th Cir. 2003) (following stop for speeding, pat-down of passenger was proper because police had information that passenger owned a firearm and might have been involved with drug crimes); *United States v. Raymond*, 152 F.3d 309, 312 (4th Cir. 1998) (following stop for speeding, pat-down of passenger was proper because officer observed passenger engage in suspicious movements); *United States v. Moorefield*, 111 F.3d 10, 13-14 (3d Cir. 1997) (same, regarding pat-down of passenger conducted following stop for traffic infractions); *United States v. Mitchell*, 951 F.2d 1291, 1295-1296 (D.C. Cir. 1991)

(same); *United States v. Woodall*, 938 F.2d 834, 837 (8th Cir. 1991) (following stop for traffic infractions, pat-down of passenger was proper because officer observed passenger engage in suspicious movements and had information that passenger might be involved in drug crimes); *United States v. Colin*, 928 F.2d 676, 678 (5th Cir. 1991) (following stop for traffic infractions, pat-down of passenger was proper because officer saw passenger engage in suspicious movements).

Indeed, those federal courts of appeals that have rejected such searches have done so only because the frisk was not justified by reasonable concerns for officer safety. See, *e.g.*, *Joshua v. DeWitt*, 341 F.3d 430, 443-444 (6th Cir. 2003) (had passenger and driver engaged in furtive gestures or other conduct giving rise to reasonable officer safety concerns, officer would have been justified in frisking them following traffic stop for speeding); *United States v. Wanless*, 882 F.2d 1459, 1465 n.10 (9th Cir. 1989) (absent any suggestion that passenger posed threat to police or that police believed their safety was in jeopardy, police pat-down of passenger following traffic stop for speeding was not justified). None of these decisions suggests that the search would have been unlawful had there been reasonable grounds to believe that the passenger might be armed and dangerous. On the contrary, they strongly imply precisely the opposite conclusion.

State supreme courts are also in accord. In *People v. Gonzalez*, 704 N.E.2d 375 (Ill. 1998), abrogated on other grounds by *People v. Sorenson*, 752 N.E. 2d 1078, 1083 (Ill. 2001), a police officer, after stopping a car in which the defendant was a passenger for speeding, observed the defendant "abruptly" get out and begin

walking away. See *Gonzalez*, 704 N.E.2d at 377. Although the officer had no reason to suspect that the defendant had committed or was committing a crime, Illinois' highest court held that the officer committed no Fourth Amendment violation when he ordered the defendant to return; asked him whether he was carrying any weapons; and, upon receiving an affirmative answer, subjected him to a pat-down that revealed a handgun. See *id.* at 380-385. As the court explained, the weapons search was justified because "the circumstances * * * were sufficient to create a reasonable suspicion that the defendant was armed and a threat to [the officer's] personal safety," thus satisfying the *Terry* standard. *Id.* at 385 (internal quotation marks omitted); see also *Sorenson*, 752 N.E.2d at 1084 ("following a lawful traffic stop," a police officer may subject "the driver and any passengers * * * to a limited search for weapons, commonly referred to as a 'frisk' * * * if the officer reasonably believes the person is armed and dangerous").

Likewise, other state supreme courts have approved a police officer's decision during a routine traffic stop to pat-down a passenger for weapons based on reasonable suspicion that the passenger might be armed and dangerous. See, *e.g.*, *State v. Banda*, 639 S.E.2d 36, 40-41 (S.C. 2006) (following stop for driving with stolen license plates, pat-down of passenger was proper because officer reasonably believed drugs were present in the vehicle, giving rise to reasonable presumption that weapons were present as well); *Fender v. State*, 74 P.3d 1220, 1225-1229 (Wyo. 2003) (following stop for speeding, pat-down of passenger was proper because circumstances, including bulge in

passenger's pocket, gave rise to reasonable officer safety concerns); *State v. Horrace*, 28 P.3d 753, 757-760 (Wash. 2001) (applying Washington law to hold that, following stop for speeding, pat-down of passenger was proper because officer observed driver engage in movements suggesting he had concealed a weapon in passenger's jacket); *Shaver v. State*, 963 S.W.2d 598, 599-600 (Ark. 1998) (following stop for speeding, pat-down of passenger was proper because officer had information that passenger had weapons in vehicle); *People v. Jackson*, 948 P.2d 506, 507-508 (Colo. 1997) (*en banc*) (following stop for traffic infractions, pat-down of passenger was proper because officer saw passenger making furtive gestures); *People v. Batista*, 672 N.E.2d 581, 583-584 (N.Y. 1996) (following stop for running red light, pat-down of passenger was proper because passenger engaged in unusual and evasive conduct); *State v. Smith*, 637 A.2d 158, 168-169 (N.J. 1994) (following stop for speeding, pat-down of passenger was proper because passenger engaged in unusual behavior and officer observed bulge beneath her blouse).

Numerous state appellate courts have reached the same conclusion. See, *e.g.*, *State v. Shearin*, 612 S.E.2d 371, 375-378 (N.C. Ct. App. 2005) (following stop for inoperable license plate light, pat-down of passenger was proper because passenger became agitated); *Dewberry v. State*, 905 So. 2d 963, 966-967 (Fla. Dist. Ct. App. 2005) (following stop for traffic infractions, pat-down of passenger was proper because officer saw passenger making furtive movements); *Matoumba v. State*, 873 A.2d 386, 389-392 (Md. Ct. Spec. App. 2005) (same, regarding pat-down following stop for speeding); *Ford v. State*, 26 S.W.3d 669, 673-674 (Tex. App. 2000)

(following stop for traffic offenses, pat-down of passenger was proper because officer observed passenger engage in furtive movements and knew he had scuffled with and fled from police in the past); *State v. Richards*, 713 So. 2d 514, 517 (La. Ct. App. 1998) (following stop for traffic infraction, pat-down of passenger was proper because passenger admitted to carrying a weapon); *Jackson v. State*, 669 N.E.2d 744, 748 (Ind. Ct. App. 1996) (following stop for traffic infraction, pat-down of passenger was proper because officer saw passenger making furtive movements); *Commonwealth v. Mesa*, 683 A.2d 643, 645-646 (Pa. Super. Ct. 1996) (same, regarding pat-down of passenger following stop for speeding); *People v. Massey*, 546 N.W.2d 711,712-713 (Mich. Ct. App. 1996) (following stop for speeding, pat-down of passenger was proper because officer observed bulge in passenger's jacket pocket at the waist); *State v. Randleman*, 671 N.E.2d 267, 269-270 (Ohio Ct. App. 1995) (following stop for routine traffic violation, pat-down of passenger was proper because officer observed passenger engage in suspicious movements and knew he had history of carrying guns); *State v. Phommachanh*, 662 A.2d 1343, 1344-1345 (Ct. App. Ct. 1995) (because police were justified in stopping car for traffic infraction, trial court erred in requiring suspicion of additional criminal conduct to justify pat-down of passenger; proper standard is whether police could reasonably believe passenger might be armed and dangerous); *Ammons v. State*, 322 S.E.2d 543, 544 (Ga. Ct. App. 1984) (following stop for drag racing, pat-down of passenger was proper because officer saw passenger making furtive movements); *State v. Jackson*, 557 P.2d 691,

692-694 (Or. Ct. App. 1976) (same, regarding pat-down of passenger following stop for expired license plates).

Still more state courts have indicated in dicta that they would reach similar holdings, were the question squarely presented. See, *e.g.*, *Mitchell v. State*, 745 N.E.2d 775, 780 (Ind. 2001) (during "routine traffic stop," "[a]n officer may perform a *Terry* 'pat-down' of a driver or any passenger if he has reasonable suspicion that they may be armed and dangerous"); *Camp v. State*, 983 So.2d 1141, 1144 (Ala. Crim. App. 2007) (stating that "officers conducting a traffic stop may take such steps as are reasonably necessary to protect their personal safety," including "a protective search of the driver, * * * the passengers, * * * and the vehicle") (internal quotation marks, brackets, and citations omitted).

And like their federal counterparts, the state courts that have rejected pat-downs have done so only where police officers lacked reasonable grounds to fear for their safety. See, *e.g.*, *McCain v. Commonwealth*, 659 S.E.2d 512, 516-518 (Va. 2008) (pat-down of passenger following traffic offense stop was improper because police lacked reasonable suspicion passenger might be armed and dangerous); *Commonwealth v. Washington*, 869 N.E.2d 605, 612 (Ma. 2007) (applying Massachusetts law to hold the same, regarding police exit order and pat-down of passenger following routine traffic stop); *State v. Kyles*, 675 N.W.2d 449, 453, 464 (Wis. 2004) (same, regarding pat-down of passenger following stop for operating without headlights after dark); *State v. Baker*, 182 P.3d 935, 939-941 (Utah Ct. App. 2008) (same, regarding pat-down of passenger following stop because license plate was not illuminated); *Erickson v. State*, 141 P.3d 356, 360-362

(Alaska App. 2006) (same, regarding pat-down of passenger following traffic offense stop); *State v. Eggersgluess*, 483 N.W.2d 94, 97 (Minn. Ct. App. 1992) (same).

In short, the state and federal courts to consider the question have universally held that police officers, acting on reasonable officer safety concerns, may frisk a stopped vehicle's occupants for weapons even absent cause to believe that the individual has committed or is committing a crime. This approach is well grounded in the uncontroverted rationale, see *supra* pp. 9-11, that traffic stops are inherently dangerous. Indeed, as then-Judge Roberts explained, "[a]pproaching a stopped car—particularly when there is reason to believe the driver or occupants may be armed—is one of the more perilous duties imposed on law enforcement officials." *United States v. Holmes*, 385 F.3d 786, 791 (D.C. Cir. 2004). This is because

> [e]very traffic stop * * * is a confrontation. The motorist must suspend his or her plans and anticipates receiving a fine or perhaps even a jail term. That expectation becomes even more real when the motorist or a passenger knows there are outstanding warrants or current criminal activities that may be discovered during the course of the stop. Resort to a loaded weapon is an increasingly plausible option for many motorists to escape those consequences, and the officer, when stopping a car on a routine traffic stop, never knows in advance which

> motorists have that option by virtue of possession of a loaded weapon in the car.

United States v. Holt, 264 F.3d 1215, 1223 (10th Cir. 2001) (*en banc*).

As a result, federal courts have recognized that "[t]he terrifying truth is that officers face a very real risk of being assaulted with a dangerous weapon each time they stop a vehicle." *Ibid.*; accord, *e.g.*, *United States v. Bullock*, 510 F.3d 342, 349 (D.C. Cir. 2007) ("Statistics show that traffic stops continue to be extraordinarily dangerous to the police officers who risk their lives to protect the public."); *Moorefield*, 111 F.3d at 13 ("traffic stops are dangerous encounters that result in assaults and murders of police officers"); *United States v. Stanfield*, 109 F.3d 976, 978 (4th Cir. 1997) ("Law enforcement officials literally risk their lives each time they approach occupied vehicles during the course of investigative stops."); *United States v. Menard*, 95 F.3d 9, 11 (8th Cir. 1996) (noting "the inherent danger traffic stops pose to police officers").

Myriad state court decisions echo this view. See, *e.g.*, *State v. Sloane*, 939 A.2d 796, 802 (N.J. 2008) (police officers "are at risk when they approach individuals during a traffic stop"); *Everitt v. General Electric Co.*, 932 A.2d 831, 844 (N.H. 2007) ("Even routine traffic stops can be unpredictable and can escalate into dangerous, and sometimes deadly, affairs."); *State v. Warren*, 78 P.3d 590, 596 (Utah 2003) (noting "inherent safety concerns in all traffic stops"); *State v. Vandenberg*, 81 P.3d 19, 28 (N.M. 2003) ("Relevant studies yield [the] disturbing results" that "[t]raffic stops can be very dangerous."); *Jackson*, 948 P.2d at 507 ("Roadside encounters between a police

officer and the occupants of an automobile present particular hazards that may give rise to the need to conduct a weapons search.") (internal quotation marks omitted); *State v. Irwin*, 137 P.3d 1024, 1028 (Idaho Ct. App. 2006) (noting "the general danger for police officers that requires wariness in any traffic stop"); *Shearin*, 612 S.E.2d at 378 ("the potential for danger to an officer during a traffic stop is high"); *Randleman*, 671 N.E.2d at 270 (noting that police officers are "vulnerable to danger" from both drivers and passengers during traffic stops).

That law enforcement officers face unique dangers when conducting even routine traffic stops is thus not subject to dispute. In light of these significant risks, state and lower federal courts have routinely approved police pat-downs of a vehicle's occupants on reasonable suspicion that they might be armed and dangerous, without requiring additional suspicion of criminal conduct other than the traffic offense. This Court should conclusively endorse this longstanding police practice, which accrues significant public safety benefits while imposing only minimal individual privacy costs.

III. OFFICER TREVIZO'S PAT-DOWN OF RESPONDENT WAS PROPER BECAUSE IT OCCURRED DURING A LAWFUL TRAFFIC STOP AND ON REASONABLE SUSPICION THAT HE MIGHT BE ARMED AND DANGEROUS.

Respondent does not dispute that the police had probable cause to stop the car in which he was riding for a violation of the traffic laws. This concession obviates any doubts about the propriety of the traffic stop, and, indeed, the Arizona Court of Appeals

expressed no such concerns. Instead, the majority was persuaded that, during the few moments before the pat-down, the stop came to an end and was replaced by a "consensual encounter" between respondent and Officer Trevizo. Pet. App. A15-A17. The majority was incorrect: Because no reasonable person in respondent's circumstances would have believed that the investigation into the traffic offense was complete and he was now free to leave, the traffic stop was ongoing, and Officer Trevizo therefore was entitled to undertake a limited search of respondent's person once the officer had reasonable grounds to fear for her safety.

Brendlin v. California, 127 S. Ct. 2400 (2007), establishes that respondent remained seized pursuant to the traffic stop at the time of the pat-down. There, the Court held that, during a traffic stop, a passenger is seized within the meaning of the Fourth Amendment so long as no "reasonable person in [his] position * * * would have believed himself free to terminate the encounter between the police and himself." *Id.* at 2406 (internal quotation marks and citation omitted). The Court emphasized that once a car has been pulled over a reasonable person would anticipate that any law enforcement officer "will not let people move around in ways that could jeopardize his safety." *Id.* at 2407.

By this standard (and as petitioner ably explains), a reasonable passenger in respondent's position would not have felt free to leave. Accordingly, respondent was seized pursuant to an ongoing traffic stop at the time of the frisk. To start, the police had not concluded their investigation into the traffic offense by returning to the car's driver his documentation or otherwise indicating that he was free to go. And while the driver

remained seized, so, too, was respondent, who was far from home,[2] without means of transportation, and without any indication from police that he was free to go. To the contrary, the officers' conduct communicated that respondent was required to stay. Officer Machado had ordered the car's occupants to put their hands where they could be seen, an officer questioned each occupant separately, and the driver and respondent were asked to exit the car for additional questioning. Pet. App. A3-A5, A21. As Judge Espinosa recognized, in light of these events, no reasonable person in respondent's situation could conclude that the stop was over insofar as he was concerned and he was free to leave. *Id.* at A20-A23.

Thus, the traffic stop was ongoing when Officer Trevizo frisked respondent. Under these circumstances, the police were entitled to perform a pat-down on reasonable suspicion that he might be armed and dangerous. Compare *Jackson*, 948 P.2d at 508 (police pat-down of passenger that occurred 10-15 minutes after traffic stop was proper given ongoing police investigation into traffic violation), with *State v. Henage*, 152 P.3d 16, 19-20 (Idaho 2007) (because police had concluded traffic stop by returning driver's documentation prior to pat-down of passenger, trial court did not clearly err in finding that stop had evolved into consensual encounter by time of pat-down). That the pat-down did not occur immediately after the car was pulled over does not counsel otherwise, for there is no reason to believe that "an

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[2] Eloy, Arizona, which respondent identified as his home, is approximately fifty miles from Tucson, Arizona, where the traffic stop occurred.

investigating officer cannot be in as much danger at the end of a traffic stop as at the beginning, or at least reasonably believe that to be so." *Vandenberg*, 81 P.3d at 28. As a result, Officer Trevizo did not need to address her concerns about respondent's dangerousness simply by "avoid[ing]" him, as the Arizona Court of Appeals suggested. Pet. App. A8 (internal quotation marks and citation omitted). To the contrary, because respondent was detained pursuant to an ongoing traffic stop, Officer Trevizo was entitled to undertake a pat-down to alleviate reasonable officer safety concerns.

The court below concluded otherwise, citing Officer Trevizo's testimony that she believed respondent was free to decline to exit the car for additional questioning and the fact that her intended line of questions was unrelated to the purpose of the traffic stop. This was error for two reasons.

First, "[s]ubjective intentions play no role" in the Fourth Amendment analysis. *Whren*, 517 U.S. at 813; see also *Brendlin*, 127 S. Ct. at 2408-2409. Accordingly, that Officer Trevizo had decided in her own mind that respondent was free to refuse to participate is immaterial. This Court has repeatedly "noted [its] 'unwilling[ness] to entertain Fourth Amendment challenges based on the actual motivations of individual officers.'" *Arkansas v. Sullivan*, 532 U.S. 769, 771-772 (2001) (quoting *Whren*, 517 U.S. at 813). Thus, "'the fact that [an] officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action as long as the circumstances, viewed objectively, justify the action.'" *Ohio v. Robinette*, 519 U.S. 33, 38 (1996)

(quoting *Whren*, 517 U.S. at 813). The state court should not have considered Officer Trevizo's subjective intentions.

Rather, the appropriate inquiry, as we have explained, is what a reasonable person in respondent's situation would have understood. Officer Trevizo never told respondent that he was free to refuse to answer her questions or get out of the car, and no reasonable person in his circumstances would have understood that he was free to do so. On this point, as Judge Espinosa noted, Pet. App. A20-A21, the court confused Officer Trevizo's courtesy and respondent's cooperation with a termination of the seizure. That Officer Trevizo asked rather than ordered respondent to exit the car would not have conveyed to a reasonable person that he was free to decline. Where police have detained a vehicle, common sense suggests that a reasonable passenger would understand an officer's request to exit the car as an offer not to be refused. Indeed, a holding otherwise would discourage police officers from treating detainees with courtesy, something the "reasonableness" inquiry underlying this Court's Fourth Amendment jurisprudence cannot tolerate. Equally, that respondent cooperated does not, in and of itself, suggest that the seizure was over. It indicates merely that respondent made the understandable decision to acquiesce rather than escalate the situation.

Second, that Officer Trevizo questioned respondent about matters unrelated to the traffic stop is also immaterial. Although a stop "that is lawful at its inception" may violate the Fourth Amendment "if it is prolonged beyond the time reasonably required to complete" the stop's mission, there is no violation so

long as the stop was "executed in a reasonable manner" and its duration "justified by the traffic offense and the ordinary inquiries incident to such a stop." *Illinois v. Caballes*, 543 U.S. 405, 407-408 (2005). This is true even if a police officer's conduct precipitates a "shift in purpose" during the investigation, so long as that conduct does not in and of itself implicate the Fourth Amendment. *Id.* at 408-409. Thus, in *Caballes*, the Court held that the use of a narcotics-detection dog during a lawful traffic stop does not run afoul of the Fourth Amendment. See *id.* at 408-410. And in *Muehler v. Mena*, 544 U.S. 93 (2005), the Court followed *Caballes* to hold that police properly may ask questions unrelated to the purpose of a seizure without running afoul of the Fourth Amendment, so long as the off-topic questioning does not prolong the detention. See *id.* at 101.[3] As the Court explained, "'mere police questioning does not constitute a seizure,'" and, accordingly, off-topic questioning without more cannot violate the Fourth Amendment. *Ibid.* (quoting *Florida v. Bostick*, 501 U.S. 429, 434 (1991)).

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[3] Although *Muehler* concerned the detention of a home's occupants while the premises were searched pursuant to a warrant, courts have universally recognized that *Muehler* is equally applicable to traffic stops. See, *e.g.*, *United States v. Soriano-Jarquin*, 492 F.3d 495, 501 (4th Cir. 2007); *United States v. Olivera-Mendez*, 484 F.3d 505, 510 (8th Cir. 2007); *United States v. Mendez*, 476 F.3d 1077, 1080 (9th Cir. 2007); *United States v. Stewart*, 473 F.3d 1265, 1269 (10th Cir. 2007); *United States v. Hernandez*, 418 F.3d 1206, 1209 n.3 (11th Cir. 2005); *United States v. Singh*, 415 F.3d 288, 294 (2d Cir. 2005); see also *People v. Harris*, 886 N.E.2d 947, 960-961 (Ill. 2008) (collecting cases).

Because respondent remained seized pursuant to a lawful traffic stop, Officer Trevizo was entitled to frisk him if there were reasonable grounds to suspect that he might be armed and dangerous. And although the Arizona Court of Appeals declined to resolve the issue, Pet. App. A14, there can be no question that reasonable suspicion supported the pat-down here. A weapons frisk "is permissible if the police officer possesses a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant' the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons." *Long*, 463 U.S. at 1049 (quoting *Terry*, 392 U.S. at 21). "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry*, 392 U.S. at 27. Moreover, "[t]he determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior." *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000).

As Judge Espinosa recognized, Pet. App. A23-A24, this standard was clearly satisfied. Multiple factors would have led a reasonable officer to believe that respondent might be armed and dangerous. Officer Trevizo observed a scanner in respondent's jacket pocket, suggesting that he may be involved in criminal activity and, thus, carrying a firearm. Cf. *Batista*, 672 N.E.2d at 583 (noting that while wearing a bulletproof vest is not, itself, illegal, it reasonably suggests possession of a firearm). She also noted the many signs that respondent was associated with a gang—his

age, the blue clothing and bandana, his felon status, his being from a known Crip neighborhood, and the location of the stop on the border of another Crip area. The "characteristics of a location" are "among the relevant contextual considerations in a *Terry* analysis." *Wardlow*, 528 U.S. at 124. And Officer Trevizo also knew from her police training that gang members often carry firearms. Under these circumstances, she was prudent to conclude that respondent might present a danger to her safety, as well as the safety of her fellow officers and the public. Indeed, it would have been imprudent for her to conclude otherwise, and, accordingly, her pat-down of respondent was properly justified by reasonable safety concerns and was therefore lawful.

CONCLUSION

The decision of the Arizona Court of Appeals should be reversed.

Respectfully submitted.

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